Nos. 14-556, 14-562, 14-571 & 14-574

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IN THE
# Supreme Court of the United States

JAMES OBERGEFELL, ET AL., AND BRITTANI HENRY, ET AL.,
PETITIONERS,

v.

RICHARD HODGES, DIRECTOR, OHIO DEPARTMENT OF HEALTH, ET AL., RESPONDENTS.

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VALERIA TANCO, ET AL., PETITIONERS,

v.

WILLIAM EDWARD "BILL" HASLAM, GOVERNOR OF TENNESSEE, ET AL., RESPONDENTS.

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APRIL DEBOER, ET AL., PETITIONERS,

v.

RICK SNYDER, GOVERNOR OF MICHIGAN, ET AL., RESPONDENTS.

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GREGORY BOURKE, ET AL., AND TIMOTHY LOVE, ET AL.,
PETITIONERS,

v.

STEVE BESHEAR, GOVERNOR OF KENTUCKY, ET AL.,
RESPONDENTS.

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**On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit**

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## BRIEF OF *AMICI CURIAE* MAE KUYKENDALL, DAVID UPHAM AND MICHAEL WORLEY IN SUPPORT OF NEITHER PARTY AND URGING AFFIRMANCE ON QUESTION 1

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## QUESTION PRESENTED

This brief addresses the question: Does the Fourteenth Amendment require a state to license a marriage between two people of the same sex?

This brief is filed in support of neither party because *Amici* disagree on the second question: Does the Fourteenth Amendment require a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state?

*Amici* note below their various positions on the second question.

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## INTERESTS OF *AMICI*[1]

*Amici* are legal scholars who believe that the Fourteenth Amendment does not require states to license same-sex marriage. *Amici* disagree on the answer to the second question regarding recognition of out-of-state marriages and cite their various positions below and in the appendix. They also disagree on whether states, acting through any organ of the government structure, should legalize the licensing of same-sex marriage. *Amici* file together to highlight key issues that will occur should this Court rule that the Fourteenth Amendment requires states to issue licenses to two people of the same sex.

*Amici*[2] are

Mae Kuykendall, Michigan State University College of Law.

David Upham, Associate Professor of Politics University of Dallas

Michael T. Worley, Family Policy Attorney, Provo, Utah.

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[1] No one (including a party or its counsel) other than the *Amici curiae*, their members and counsel authored this brief in whole or in part, or made a monetary contribution intended to fund its preparation or submission. No educational institution has endorsed or financed this brief. All parties have consented to the filing of this brief. The Petitioners in all four cases consented to this brief and a letter noting consent is on file with the Clerk. Blanket consent from respondents in all four cases is noted in communications on file with the Clerk.

[2] Institutional affiliations of *Amici* are for identification only.

## STATEMENT

As this Court stated in *United States v. Windsor*, "The definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the '[p]rotection of offspring, property interests, and the enforcement of marital responsibilities.' " 133 S.Ct 2675, 2691 (2013) (citing *Williams v. North Carolina*, 317 U.S. 287, 298 (1942)). This broad authority is at the heart of why licensing marriages for same-sex couples is not a duty imposed by the Fourteenth Amendment. Were such licensing to include same-sex couples, these changes to the conditions of marriage would dramatically impact the "[p]rotection of offspring, property interests, and the enforcement of marital responsibilities." As the opposite-sex nature of marriage was historically "essential to the very definition of that term," numerous state laws were based on such a "role and function." *Windsor*, 133 S.Ct. at 2689.

This does not mean that the domestic relations exception to federal jurisdiction, which generally precludes federal courts from ruling on certain matters in family law, precludes the Court from ruling here. This Court previously has ruled unconstitutional laws imposing certain restrictions on marriage. *See, e.g. Loving v. Virginia*, 388 U.S. 1 (1967) (striking down broad law forbidding inter-racial marriage). *Amici* readily concede the domestic relations exception does not preclude reversing the Sixth Circuit.

Nevertheless, the domestic relations exception is still pertinent—even crucial—to the outcome of this case. The changes to state licensing requirements suggested by Petitioners would necessitate increased federal jurisdiction over traditionally state law ques-

tions. A ruling of this nature would overtime erode the domestic relations exception. This domestic relations exception is a key example of letting state courts and legislatures experiment with what is best for them. Were it to be limited, the consequences on state law would be detrimental to state sovereignty.

Why do deleterious consequences of a holding requiring licensing of same-sex marriages affect the interpretation of the content of the Fourteenth Amendment? This Court realizes that the doctrines of the Fourteenth Amendment, if not checked, would upset the balance of federalism.

As Chief Justice Roberts has noted in a case regarding an invitation to find a new fundamental right in the area of post-conviction relief, "As a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." *District Attorney's Office v. Osborne*, 129 S.Ct. 2308, 2322 (2009) (quoting *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992)). Why is the Court so reluctant? As Chief Justice Roberts explained:

> "This approach would take the development of rules and procedures in this area out of the hands of legislatures and state courts shaping policy in a focused manner and turn it over to federal courts applying the broad parameters of the Due Process Clause. There is no reason to constitutionalize the issue in this way." *Id.* at 2312.

Such is the case here. Whether licensing were to be mandated under the equal protection clause or the due process clause, the needed institutional guide-

posts for responsible decisionmaking in this area are "scarce and open-ended." A licensing ruling would do exactly what this Court was reluctant to do in *Osborne* and other cases–take family law prerogatives "out of the hands of legislatures and state courts" and "turn [them] over to federal courts."

If the Fourteenth Amendment mandates marriage licensing for same-sex couples, federal courts would assume broad authority over state family law. Newly federalized disputes would occur for an unpredictable period of time. These unpredictable but probable effects show that it is difficult for broad, sweeping mandates such as the proposed licensing ruling to coexist with a federalist system. States' comprehensive policies on marriage must be revised by the states themselves if they choose to give licenses to same-sex couples. The other option is this: what was formerly based in state court rulings and state family law will be drastically modified by federal constitutional and statutory law. Mandated licensing would signify federal control of "differences across states in areas like divorce, child custody and inheritance."[3] As Judge Sutton noted, such a ruling would leave the states with "little authority" to resolve "debates about how to define marriage (and the benefits and burdens that come with it)." *DeBoer v. Snyder*, 772 F.3d 388, 415 (6th Cir. 2014). Any logic requiring licensing would of necessity expand the doctrines available for federal courts to modify other aspects of state family law.

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[3] *See* Mae Kuykendall, *A Way Out of the Same-Sex Marriage Mess*, The New York Times (May 24, 2012), Page A31, available at: http://www.nytimes.com/2012/05/24/opinion/a-way-out-of-the-same-sex-marriage-mess.html.

Experience in states that have legalized same-sex marriage through state mechanisms compared with analogous experiences in states where federal courts have ruled on licensing exemplifies this point. At least one lawsuit in Indiana is already in progress seeking to modify other elements of the states' broad authority regarding marriage law. Federal courts have no institutional framework for addressing such cases. The Sixth Circuit should be affirmed with respect to the licensing question.

The *Amici* are split on the recognition question. *Amicus* Kuykendall believes that state courts will creatively adapt as they face issues created by out-of-state recognition and will respect constitutional norms. *Amicus* Upham believes no constitutional provision speaks to the issue of same-sex marriage. *Amicus* Worley believes that interstate travel and *stare decisis* would quickly blur the distinctions between licensing and recognition and broaden the scope of the Fourteenth Amendment. *Amici* file together to emphasize the foreseeable problems if this Court reverses the Sixth Circuit on question one. They hope this Court rules in the spirit of respect for differing points of view.

## ARGUMENT

### I. This Court avoids expounding on the meaning of marriage in relation to a broad and detailed set of state-regulated laws and court rulings.

Thousands of families turn to state courts every year to deal with many family life issues. Each state court deals with complex issues essentially foreign to federal courts. These state courts are not well versed in federal courts' jurisprudence on equality and due process. Instead, they focus on practical issues such as equity, custody, and family finances. The rulings by these courts are responsive to practical issues and state codes. These families also turn to state legislators to correct flaws in the laws that state courts interpret.

Federal laws and court rulings differ significantly from state laws and court rulings with respect to family law. These differences demonstrate that the Fourteenth Amendment does not require the licensing of marriages for same-sex couples. The complex effects of a contrary holding on state law would be broad and far-reaching. This is because a ruling mandating licensing could speak to the *conditions* for marriage, but neither such a ruling nor any previous ruling by this Court constructs the *institutional framework* of marriage law. A condition speaks to who gets married; the framework speaks to the benefits and burdens that come with marriage. *See DeBoer v. Snyder*, 772 F.3d 388, 415 (6th Cir. 2014).

Regardless of the conditions on marriage this Court sets, this Court cannot dictate that the states must modify the subject of domestic relations with

respect to the '[p]rotection of offspring, property interests, and the enforcement of marital responsibilities.' " 133 S.Ct 2675, 2691 (2013) (citing *Williams v. North Carolina*, 317 U.S. 287, 298 (1942)). This Court has never said in any degree of specificity anything about how states should administer marriage laws. Were it to attempt such, this void in jurisprudence would have to be filled by a significant volume of work by federal courts. As couples present novel disputes for courts to resolve under federal jurisdiction, the domestic relations exception would become narrower and narrower. The role of the states as architects of marriage structure must not be questioned. The enforcement of same-sex licensing rules through a constitutional mandate is inherently destabilizing to the domestic relations exception.

### A. This case is about an institution as well as individuals.

Each state has many laws regarding marriage and family life. These many complex requirements show that state governments are intensely involved in marriage as an institution. Historically, societies have not viewed marriage as based on the love that is shared by John and Sally, or Donald and Louise, or Tyler and Annabelle. While culturally marriage has become linked with romantic love, each state has numerous restrictions on marriage that have little to do with love. All states have extensive and complex laws about the marriage relationship.[4] John and Sal-

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[4] For example, Kentucky's annotated code devotes 328 pages to describing its family law; Michigan's 623; Ohio's 526; and Tennessee's 910. Ky. Rev. Stat. Ann. §§ 401.010-507.5902 (excluding indexes and supplements); Mich. Comp. Law Ann. §§ 551.1-552.1901 (same); Ohio Rev. Code §§ 3101.01-3127.53 (same);

ly will have a harder time in many states ending their marriage than starting it—whether or not children are involved.[5]

Each state regulates marriage both to preserve the autonomy of the family and to provide safeguards for when the family structure fails. The states have developed structures foreign to this Court. These include: the "best interests of the child" standard,[6] waiting periods to moderate passions,[7] and adoption and foster care procedures.[8]

Further, each state has strong policies either favoring or disfavoring recognition of marital rights in non-marital relationships.[9] These laws are based in background assumptions about fairness derived from the dependencies and expectations associated with male-female partnerships. While some effects are foreseeable, the details of how a licensing ruling would affect each of the policies administered by the

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Tenn. Code Ann. §§ 36-1-101- 36-7-503 (same). Given the complexity of both these codes and the cases interpreting them, *Amici* can only foretell a small sampling of future federal issues raised by a licensing decision.

[5] *See, e.g.*, Mich. Comp. Law Ann. §§ 552.1 *et seq.* (criteria for divorce).

[6] *See, e.g., Kendrick v. Shoemake*, 90 S.W.3d 566, 567 (Tenn. 2002) (evaluating what is in the "child's best interests").

[7] *See, e.g.*, Ky. Rev. Stat. Ann. § 403.044 (thirty day waiting period for divorce when children are involved).

[8] *See, e.g.*, Ohio Rev. Code §§ 3107.01 *et seq.*

[9] *Compare Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976) (favoring recognition of non-marital relationships) *with Carnes v. Sheldon*, 311 N.W.2d 747 (Mich. 1981) (disfavoring recognition of non-marital relationships).

states cannot be known. However, it is certain that parties will seek federal guidance on the reach of the equality and due process principles in family law.

States do and will see marriage as far more complicated than mutual compassion, affection and romantic love. States routinely address aspects of marriage no less important than the romantic ideal, aspects traditionally kept away from federal court by adherence to the domestic relations exception.[10]

### B. States have historically—with few exceptions—set the boundaries regarding institutional effects of marriage in their state.

*Windsor* and numerous other cases have explained that "the States, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce." *Haddock v. Haddock*, 201 U.S. 562, 575 (1906). Indeed, the "whole subject" of marriage law has been historically a matter for states. *In re Burrus* 136 U.S. 586, 593–594 (1890). Congress is excluded from control over domestic relations via the Constitution.[11] Further, federal

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[10] For example, phrases such as "[b]est interests of the child" are central phrases in resolving custody disputes. The phrase "[b]est interests of the child" appears over twenty seven thousand times in a database of State court opinions and under *eight hundred* in a parallel database of federal court opinions. *See* Google Scholar searches, Best interests of the child, http://bit.ly/BIChildstate and http://bit.ly/BIChildFederal (Last visited Feb. 23, 2015).

[11] *See* U.S. Const. Amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."); *Nat. Fedn. of Indep. Business v. Sebelius*, 132 S.Ct. 2566, 2577 (2012) (Roberts, J.) ("In our federal system, the National

courts are prevented from ruling on domestic matters through the domestic relations exception. *Ankenbrandt v. Richards,* 504 U.S. 689, 697-704 (1992) (historical background of the exception).

As *Windsor* explained, "state laws defining and regulating marriage, of course, must respect the constitutional rights of persons." 133 U.S. at 2691. Laws "defining" and "regulating" marriage must respect core constitutional rights of equality and procedure. *See* U.S. Const. Amend. XIV (Equal Protection and Due Process Clauses).

Due to the historical nature of marriage, this Court is being asked to apply previously established standards for equal protection and due process to a whole branch of law. The Petitioners thus ask that the Court act without a theory—a *telos*—explaining the purposes for marriage. These purposes are found in state law and cases rather than federal law and cases.

Marriage law is a poor fit for a new application of tiers of review to suspect classifications. These classifications would have to address the variations among traditional couples, same-sex female couples, and same-sex male couples. If one size does not fit all, the primary control over adjusting for differences among different types of couples must remain with states. Otherwise, what works for Massachusetts may be forced upon California or vice versa. State family law involves a complex interaction between state

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Government possesses only limited powers; the States and the people retain the remainder").

courts' adjudication of new problems and responsive lawmaking by state legislatures.

### C. This Court's precedent lacks a foundation to speak to marriage as an institution.

As Petitioners claim, this Court has previously defined marriage in a way that emphasizes individual rights. *See, e.g., Griswold v. Connecticut*, 381 U.S. 479 (1965) (right of married couples to use contraception), *Lawrence v. Texas*, 539 U.S. 558 (2003) (right of adult couples to a sexual relationship); *Boddie v. Connecticut*, 401 U.S. 371 (1971) (right to divorce as critical element of marriage); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (right of unmarried couples to the benefits of marital privacy); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976) (state may not require consent of a husband for a wife's abortion); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (state may not require a wife to notify her husband of planned abortion); *Zablocki v. Redhail*, 434 U.S. 574 (1978) (holding unconstitutional a law conditioning the marriage of a noncustodial parent on his payment of child support). These cases all concern individual rights.

For example, in a case involving the right of married couples to use contraception, the Court viewed marriage in associational terms, as "a bilateral loyalty." *Griswold*, 381 U.S. at 486. Likewise, in *Lawrence v. Texas*, the Court said, "our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education." 539 U.S. at 574. These rulings do not articulate any institutional theory of marriage law and do not contain an

affirmative jurisprudence of marriage. They speak instead to the roles of equality and due process.

It is common sense that due process and equal protection cases would contain language based in dignity and equality. All Americans of all ages surely deserve the rights promised to them since our founding, including those of life, liberty and the pursuit of happiness. Those rights, though, can only be secured upon a "foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness." DECLARATION OF INDEPENDENCE (1776).

The principles underlying the "foundation" of family law—protection of men, women and children—have been exclusively in state hands since the founding. The link between rights and their foundational "principles" and organizing "powers" is essential. In family law, these principles and powers are closely linked to the state's broad authority to regulate marriage. *See Windsor*, 133 U.S. at 2691. To manipulate the foundation without addressing the institutional principles and powers involved is inviting dissonance. In contrast, leaving states responsible to shape family law in light of the flux in family forms is most likely to promote sound policies responsive to the needs of American families over time. *See Troxel v. Granville*, 530 U.S. 57 (2000) (plurality opinion) (recognizing new complexities caused by "changing realities of the American family").

Some cases in this Court's jurisprudence do arguably speak to the institutional aspects of marriage. *See, e.g., Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (due process includes right "to marry, establish a home and bring up children"). To the extent they do,

those institutional aspects are largely in conflict with reversing the Sixth Circuit. *See Skinner v. State of Okl.* ex rel. *Williamson*, 316 U.S. 535, 541 (1942) (linking "marriage" to the "very existence and survival of the race" and "procreation.").[12] While state-granted obligations and benefits of marriage are mentioned in opinions, there are typically no instructions on the boundaries or rationale for those functional elements. *See, e.g. Turner v. Safley* 482 U.S. 78, 95-96 (1987) (mentioning both equality and functional elements). The functional elements mentioned reflect, rather than direct, state law.

The occasional invocation by this court of the purposes states have for marriage as a legal status does not imply this court has the framework to uphold these purposes. The Court as an institution lacks the tools, precedent, or expertise needed to speak to marriage as changing demographics alter its form and address or adjust the foundation laid by the states in past generations. Because of this lack of precedent,

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[12] One reading is that *Skinner*'s linking of marriage to procreation, taken at face value, would weigh heavily towards reaffirming the State's right to control whether same-sex couples receive marriage licenses. This reading is disputed. Some lower courts have found *Skinner* not to be based in this linking. *See, e.g., Bostic v. Schaefer*, 760 F.3d 352, 374 (2014) *but see id.* at 391 (Niemeyer, J., dissenting) (referencing link between marriage and procreation). The precedent existing in this Court's jurisprudence is lacking with respect to the variety of state purposes for marriage. A decision reversing the Sixth Circuit calls upon this court to supply a purposive theory of marriage. This theory would have to be one sufficiently articulated to support the subsequent efforts of state legislatures and state court judges. Inevitably, federal courts would be asked to solve issues created by an altered conception of the institution

the Court must affirm the Sixth Circuit with respect to licensing. A ruling to the contrary would upset principles found in numerous state laws. Each of these principles is based on "a statewide deliberative process that enabled its citizens to discuss and weigh arguments." *United States v. Windsor* 133 S.Ct at 2689.[13]

Some have called on this court to eliminate the domestic relations exception.[14] This argument creates far more problems than it solves. The dearth of precedent in the federal courts would not magically fill with needed structure and rules. Further, the tools needed to shape institutional marriage law are not found in this court's precedent. *Amici* respectfully submit that an erosion of the domestic relations exception would open a Pandora's Box: Federal courts, charged to enforce same-sex marriage, would interfere with the states' capacity to infuse normative structural ideals into marriage law.

It is becoming a common question among both legal and public circles to question why the state is involved in marriage at all.[15] The answers to the ques-

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[13] *Amici* explain below why the Court's previous decisions did not require foundational changes in state family and marriage law. *See* part II.C, *infra*.

[14] *See, e.g.*, Steven G. Calabresi and Genna Sinel. *The Gay Marriage Cases and Federal Jurisdiction: On Why The Domestic Relations Exception to Federal Jurisdiction is Archaic and Should be Overruled* (Northwestern Public Law Research Paper No. 14-50 2014), available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2505514.

[15] *See, e.g.*, Beyond Same-Sex Marriage: A New Strategic Vision For All Our Families and Relationships, http://beyondmarriage.org.

tion of why states are involved in marriage come from state law. The complex level of benefits given each opposite-sex couple demonstrates that rather than moving beyond marriage, society should urge states to strengthen it. A ruling by this Court emphasizing state rights will help strengthen the institution of marriage in the states.

## II. For the Fourteenth Amendment to require states to license same-sex marriage, many state family law cases would have to become federal issues.

What is the importance to this case of the fact that this Court's precedent does not speak to the institutional aspects of marriage? A ruling reversing the Sixth Circuit would force the eventual creation of institutional precedent. If the Fourteenth Amendment speaks to the rights of states to license same-sex marriage, the same logic speaks to a variety of institution-based topics within family law. These topics will inevitably become federal questions and require new precedent. These questions are wide-ranging and involve topics such as divorce, the best interests of children and defining the meaning of the word "parent."

An analogy explains this well. In *Roe v. Wade*, this court concluded "that the right of personal privacy includes the abortion decision, but ... must be considered against important state interests in regulation." 410 U.S. 113, 154 (1973). As *Planned Parenthood v. Casey* further explained, a legislature cannot impose a substantial obstacle to a woman's choice to get an abortion. 505 U.S. 833, 846 (1992).

The ideals of due process require translation into practical terms. For example, earlier this term this

Court granted part of a request to lift a stay of a lower court's decision. *Whole Women's Health v. Lackey*, 574 U.S. ___ (Dkt. 14A365) (Oct. 14, 2014) (in chambers). This Court vacated a stay order with respect to clinics in two Texas cities, but maintained the stay with respect to other parts of Texas. *Id.* This Court has had to determine the scope of *Roe* and *Casey* for one state, and the determination was nuanced.

Applied to the case at hand, this kind of nuanced ruling would fit with detailed rulings in family law in state court, but not this Court's equal protection doctrine. If the Fourteenth Amendment's breadth includes licensing of same-sex marriage, it assuredly includes other complex issues with no clear solution. The Equal Protection clause or Due Process Clause would have a much-expanded scope.

To apply the words of Chief Justice Roberts in *Osborne* to this case, "[e]stablishing a freestanding right to [obtain a same-sex marriage license] would force [the Court] to act as policymakers, and our substantive-due-process [and equal protection] rulemaking authority would ... have to cover ...a myriad of other issues." *District Attorney's Office v. Osborne*, 129 S.Ct. at 2323 (2009).

### A. Numerous federal court cases would result from a licensing decision.

What are the consequences to state law of a decision mandating licensing? If the language of due process and equality compels licensing same-sex couples, the language also calls into question numerous gender-based family laws. Many questions of family law would be difficult to decide without direct state legislative involvement. In each case, however, a party failing to gain a favorable outcome in state courts or

the democratic process could file in federal court alleging a violation of his or her equal protection or due process rights.

These questions are many. They include:

- Is a child support ruling to be the same after a same-sex divorce whether or not the non-custodial parent is a biological parent? *See* Ky. Rev. Stat. Ann. § 403.212 (6) (referring to children "born of the relationship").
- Is the presumption of paternity still valid if a child is born to a woman married to another woman or does a biological father/spouse have more rights since the same-sex wife cannot be a biological relation? *See* Mich. Comp. Law Ann. § 700.2114(1) (a). [16]
- Do two fathers have a constitutional right to exclude the birth mother from being on a birth certificate?

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[16] To treat non-biological and biological parents equally under the Equal Protection Clause would be dissonant with this Court's precedent. As Justice Sotomayor has noted in a recent adoption case, Supreme Court precedent has typically favored biological parents in custody disputes. "These protections are consonant with the principle, recognized in [this Court's] cases, that the biological bond between parent and child is meaningful." *Adoptive Couple v. Baby Girl*, 133 S.Ct 2552, 2575 (2013) (Sotomayor J., dissenting). Taken on its face, this precedent conflicts with some rulings discussed in Part III, *infra*. This Court may need to overrule the biological bond favoritism found in its precedent if equal protection or due process rights extend licensing to same-sex couples.

- After a divorce, is it in the best interest of a child for a child to have visitation rights for a non-biological same-sex parent? Are parental rights of the precise same weight for former spouses irrespective of biological relation?

In some cases not state law but other federal and state courts may create these sorts of conflicts. For example, at least one court has already interpreted *Lawrence* to require a constitutional right to polygamous cohabitation. *See Brown v. Buhman*, 947 F.Supp.2d 1170, 1194, 1198-1202, 1222-25 (D. Utah 2013) *appeal docketed* Sep. 25, 2014 (relying at length on *Lawrence*). While the Tenth Circuit or this Court may overrule that case at a future date, analogous cases based on the constitutionalizing of licensing are easy to foresee.[17]

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[17] *Amici* assume any ruling by this Court requiring licensing for Petitioners will be without any intent to signal that the Fourteenth Amendment requires States to issue polyamorous marriage licenses.

Nonetheless, the reason the Fourteenth Amendment doesn't require issuing polyamorous marriage licenses largely relies on the components of marriage set in State law. Numerous State laws rely on the two-person definition of marriage just as they rely on the opposite-sex definition of marriage. For example, how would the presumption of paternity work if a woman had two husbands? *See, e.g.*, Mich. Comp. Law Ann. § 700.2114(1)(a).

Precedent set by this case must validate the State's role in determining the purposes for laws about marriage. Otherwise, the logic of equality or dignity will set the federal courts on a course to hearing and deciding demands for an individual right to multiple marriage licenses (polygamy) and to licenses creating a group of individuals who constitute one marriage (polyamory).

These predictable problems—some rooted in difficult public policy concerns—could all be solved by a careful legislature or state court; none can be efficiently or even fairly solved by the Fourteenth Amendment's call to equality. One could easily articulate possible solutions to these questions, but such answers are likely to be subject to reasonable disagreement. Without supportive state law, persons legitimately seeking vindication are likely to file under federal jurisdiction to obtain relief instead of using state courts and the democratic process.

These disputes may not solely be brought by same-sex couples. As family law jurisprudence begins to develop in federal courts, opposite-sex partners may well file in the jurisdiction—state or federal— most favorable to them. As "[t]here is only one Equal Protection Clause," the same principles that federal courts apply to same-sex couples regarding domestic matters would have to apply to opposite-sex couples. *Craig v. Boren*, 429 U.S. 190, 211 (1976) (Stevens, J., concurring).

These problems should be resolved in the states. As this Court explained in *Windsor* regarding New York's experience legalizing same-sex marriage, "[t]he dynamics of state government in the federal system are to allow the formation of consensus respecting the way the members of a discrete communi-

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Longstanding laws and persecution against adultery and polygamy would make such challenges foreseeable under equal protection theories, including animus, as well as due process theories. This court would require a theory of marriage as an entity and not a group of individuals exercising personal choices to advance their personal welfare in order to rule on such cases. There is no precedent stating such a theory.

ty treat each other in their daily contact and constant interaction with each other." 133 U.S. at 2692 (2013).

### B. As Judge Sutton noted, a licensing decision would dramatically expand Section Five of the Fourteenth Amendment.

One way federal law would carry increased jurisdiction over family matters would be in the expansion of Section Five Congressional powers under the Fourteenth Amendment.

This Court has said: "Congress must have a wide berth in devising appropriate remedial and preventative measures" to prevent violations of the Fourteenth Amendment. *Tennessee v. Lane*, 541 U.S. 509, 520 (2004). While this scope is not unlimited, the scope surely applies to protecting any right protected by the Fourteenth Amendment. *See City of Boerne v. Flores*, 521 U.S. 507, 519 (1997). Congress cannot "chang[e] what the right is," *Id.*, but it can enforce preexisting rights found in the Fourteenth Amendment. These rights must be congruent and proportionate to the injury as determined by this Court. *Tennessee v. Lane*, 541 U.S. at 520 (2004). If this Court rules same-sex couples must be allowed to receive marriage licenses, Congress would have the right to enforce (1) remedial measures, (2) preventative measures, and (3) preexisting rights relating to such licensing.

No matter how narrow Congress's Section Five power is, a licensing ruling will expand that power. To give just one example: Suppose a ruling were issued mandating that states issue marriage licenses under the Fourteenth Amendment. Suppose further that a State chose to interpret traditional divorce laws so that if a mother divorced another woman, the

mother would get less child support than if she divorced the father of the child even if the female spouse was present at the child's birth. Could Congress pass a law requiring states to treat a non-biological same-sex parent the same as a biological opposite-sex parent? Surely the answer would be yes: if state action differentiating same-sex and opposite-sex parents is invalid under the Fourteenth Amendment, Congress's action to prevent and remedy such differentiation would be congruent and proportionate to this Court's determination of the Fourteenth Amendment rights.

Such action would also reduce the scope of the domestic relations exception. If Congress has the power to create laws on divorce, custody, the presumption of paternity and other matters, federal courts must interpret such laws regardless of the domestic relations exception.

These consequences are largely indisputable. At oral argument in *United States v. Windsor*, the United States took the position that federal actions extending rights to same-sex couples are appropriate as a vindication of the Fourteenth Amendment but actions differentiating between opposite-sex and same-sex couples are not. *See* Transcript of Oral Argument at 81-82, *United States v. Windsor*, 133 S.Ct 2675 (2013) (No. 12-307) (responding to hypothetical about law extending federal benefits to all same-sex couples). Based on these statements, the position *Amici* take regarding the force of Section Five as a new basis for Congressional power appears unlikely to be disputed by the parties or other *Amici* in this case.

This newfound Section Five power would be an enormous historical anomaly. As Judge Sutton stated: "How odd that one branch of the National Government (Congress) would be reprimanded for enter-

ing the fray in 2013 and two branches of the same Government (the Court and Congress) would take control of the issue a short time later." *DeBoer v. Snyder*, 772 F.3d at 415. More than "odd," this change would be *radical*—giving Congress "a wide berth" to narrow or eliminate the domestic relations exception, an exception central to family law since our founding. The radical implications of a direct foray into state marriage laws should be clear before the Court takes such a fateful step.

In the twentieth century, the proposal to make marriage law uniform as a federal function was rejected repeatedly. *See* Edward Stein, *Past and Present Proposed Amendments to the United States Constitution Regarding Marriage* 5 Issues in Legal Scholarship 1 (2004) (cataloging rejections).[18] *Amici* urge the Court to consider the implications of awarding section 5 powers over marriage to Congress and awarding family law jurisdiction, re-engineered as Fourteenth Amendment equality or due process, to the federal courts.

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[18] For example, *see* S.J. Res. 28, 80th Cong. (1947) ("The Congress shall have power to make laws, which shall be uniform throughout the United States, on marriage and divorce, the legitimation of children, and the care and custody of children affected by annulment of marriage or by divorce."); H.J. Res. 170, 61th Cong. (1910) ("Congress is further empowered to make laws respecting marriage, divorce, and alimony, which laws shall be of a general nature and uniform in operation throughout the United States"; H.J. Res. 279, 56th Cong. (1900) ("Congress shall have power to enact uniform laws on the subject of marriage and divorce.").

### C. *Loving v. Virginia* and other right-to-marry cases did not require wholesale changes to state law.

Why have previous right-to-marry cases not caused dramatic changes to federalism? The answer lies in the historical role gender has played in marriage law.

As *Windsor* stated, historically "marriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term and to its role and function throughout the history of civilization." *Windsor v. United States* 133 S.Ct. at 2689 (2013). This "essential" link between gender and marriage extends into state law to this day. This link shows why the effects of past cases mandating licensing in other circumstances would be minor compared with the impacts of mandating licensing for couples of the same sex.

For example, Petitioners and their *Amici* cite *Loving v. Virginia*, which struck down laws forbidding interracial marriage, in support of their claim. 388 U.S. 1 (1967). Those laws were inconsistent with the common law and probably adverse to the original purpose of the Fourteenth Amendment.[19] Further, with respect to the domestic relations exception, *Loving* and this case are not analogous. While in some parts of our country, racial homogeneity was a condition of marriage prior to *Loving*, nothing about interracial marriage has any implication about the core purposes for family law. By contrast, in many states

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[19] *See* David R. Upham, *Interracial Marriage and the Original Understanding of the Privileges or Immunities Clause*, 42 Hastings Const. L. Q. 213 (2015).

the prerequisite of gender diversity speaks to the very "role and function" of marriage in state law. *See Windsor*, 133 S.Ct. at 2689.

For example, consider the potential conflicts listed on pages 16-17, *supra*, (child support rulings, conflicts over paternity, conflicts over names appearing on birth certificates and conflicts on visitation rights). All of these issues rarely, and likely never, turn on race alone under state law. They frequently turn, however, on both gender and biological relationship—two attributes fundamentally changed by an equality or due process ruling mandating licensing. Likewise, restrictions on conditions for marriage removed by constitutional reasoning, such as being incarcerated or not paying child support, typically do not raise such complex problems. *See, e.g. Turner v. Safley*, 482 U.S. 78 (1987) (incarceration); *Zablocki v. Redhail*, 434 U.S. 574 (1978) (child support).

## III. Past experience exemplifies potential issues.

Experience in the past eleven years is instructive. In states that have legalized same-sex marriage through mechanisms in their own law, the implications *Amici* have indicated are being resolved through those state mechanisms. In contrast, early federal cases in states where federal courts have mandated the licensing of same-sex marriage show clearly the erosion of the federalism historically present in state law.

### A. Experience in states that grant marriage licenses to same-sex couples through state courts or the democratic process.

When state legislatures and courts are the sole mechanism for modifying licensing requirements, implementation of same-sex marriage happens on the state level. When state laws or constitutions require same-sex marriage, the relationship between the states and the national government is untouched. Such laws are consistent with "the foundation of the State's broader authority to regulate the subject of domestic relations." *See Windsor*, 133 U.S. at 2691. A state law never can dictate the scope of federal rights of equality. States that enact same-sex marriage exemplify, rather than harm, federalism.

In these states, the concerns mentioned in part II, *supra*, are being played out in state jurisdictions, rather than federal. For example, in New York, a state court has already ruled that the presumption of paternity does not apply to same-sex couples. *See Q.M v. B.C. and J.S.*, No. 13761-13 (N.Y. Fam. Ct. Monroe Cty. 2014).[20] The Iowa Supreme Court has ruled in a conflicting way. *See Gartner v. Iowa Department of Public Health*, 830 N.W.2d 235 (Iowa 2013). These decisions match traditions of federalism in family policy considerations because they are taking place in state court under state law, rather than being decided based on federal constitutional law. A national decision mandating licensing would open up avenues for federal courts to weigh in on these issues. Should a

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[20] The text of the decision is available at: http://nylawyer.nylj.com/adgifs/decisions14/111214kohout.pdf.

family law question that is typically analyzed and answered by state legislators, judges, and local lawyers, become a federal question?

### B. Experience in states that license same-sex couples because of federal court decisions.

Until very recently, the only state to have licensed same-sex marriage as a result of a federal Court order was California. California is unique among the States in that the legislature of California was in favor of same-sex marriage while the people of California were opposed.[21] Because of this mindset, California's legislature has made adjustments to its marriage and family policies that other State legislatures would not make. For example, California has passed a law to remedy the problems of whether the biological parent or the same-sex spouse has greater parental rights.[22]

Other states will have differing views. Many states see biology as "essential" to determining whose name appears as a parent on a birth certificate. *Cf. Windsor*, 133 S.Ct. at 2689. Many states will thus resist any effort to change such requirements. For instance, Indiana law reflects the institutional link between biological parenting and the names of the parents on the birth certificate. Following the Seventh

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[21] *Compare* California Assembly Bill 849 (2005) (proposed bill to legalize same-sex marriage), available at http://bit.ly/CAAB849 *with* Cal. Const., Art. I, §7.5. ("Proposition 8") (democratic process yielding a contrary result three years later).

[22] *See* California Senate Bill 274 (2013), available at http://bit.ly/CASB274.

Circuit's ruling mandating same-sex marriage licensing, a case has been lodged alleging that Indiana's definition of being "born in wedlock" and "presumption of paternity" are unconstitutional. *See* Complaint, *Henderson v. Tippecanoe County*, No. 15-220 Dkt. No. 1 (S.D. Ind. Feb. 13, 2015). The complaint asks a *federal* court to solve an issue not just for that couple, but for all couples and other parties without the input of the Indiana legislature. *See Id.* (challenging statute facially and as-applied). This case has arisen despite the fact that federal courts have almost never ruled on presumptions of paternity.[23] It seems clear that ruling on this case *would* narrow the domestic relations exception, and may impact men previously protected by the presumption of paternity.

In addition to these many novel questions, other cases involving similar issues will need to be relitigated. *See, e.g.*, *Adar v. Smith*, 639 F.3d 146 (5th Cir. 2011) (upholding Louisiana's adoption and birth certificate laws); *Lofton v. Sec'y of Dept. of Children & Family*, 358 F.3d 804 (11th Cir. 2004) (upholding Florida's adoption laws). Even some decisions of this Court could arguably be overruled. *See Troxel v. Granville*, 530 U.S. at 68–69 (plurality opinion) (not-

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[23] In one database, only *fifty* federal court cases have used the phrase "presumption of paternity" but over *fourteen hundred* State courts have used that phrase. *See* Google Scholar searches, Presumption of paternity http://bit.ly/PoPFederal and http://bit.ly/PoPState (last visited February 23, 2015). The two most recent rulings by this Court addressing this issue yielded limited precedent due to diverse viewpoints on a sensitive issue. *Troxel v. Granville*, 530 U.S. at 68–69 (no majority opinion); *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (no majority opinion).

ing presumption of paternity is based on the parent's "natural bonds").

These effects are even more striking when the issue of conscientious objections is considered. Some state court judges have chosen to resign rather than officiate over same-sex marriages.[24] Similarly, many legislators will simply feel that it violates their conscience to vote for bills that would implicitly accept same-sex marriage as the law of the land. Because of their sincere beliefs, their state law will reflect the institutional man-woman definition of marriage, even as they issue same-sex marriage licenses. These conscientious objections only ensure that these conflicts will arrive in Federal Court. A direct ruling stating that state marriage law requires licensing of same-sex marriage would cause federal supervision of state marriage law.

## IV. *Amici* take no position on the second question presented.

*Amici* take no position on the interstate recognition question in this case.[25]

*Amicus* Kuykendall feels that the recognition decision would return family law principles to state courts to apply the decision of recognition with minimal or no oversight by federal courts. She believes state courts will creatively maintain the current relationship between federal law and state family law in-

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[24] *See* Associated Press, Gay marriage: North Carolina official resigns (Oct. 16, 2014), available at: http://bit.ly/NCJudges.

[25] The Appendix provides more detail regarding how *Amici* disagree in regards to the second question.

tact. In *Amicus* Upham's view, nothing in the Fourteenth Amendment or anywhere else in the Constitution requires the states to discard the understanding of marriage once unanimously endorsed by this Court.[26] *Amicus* Worley feels the distinction between licensing and recognition is too slight to prevent many of the impacts listed here. He further feels that the mandates of equal protection and due process simply do not have a broad sweep to dictate how one state addresses decisions of another state emanating from its political framework.[27]

All *Amici* acknowledge that people of good will can disagree on both questions presented. *Amici* are united, however, in stating that mandating licensing for same-sex couples would entangle federal courts in matters of state law. This entanglement compels affirming the Sixth Circuit with respect to question one.

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[26] *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885).

[27] *See Also DeBoer v. Snyder*, 772 F.3d at 418-420 ("The Constitution in general does not delineate when a State must apply its own laws and when it must apply the laws of another State. Neither any federal statute nor federal common law fills the gap. Throughout our history, each State has decided for itself how to resolve clashes between its laws and laws of other sovereigns—giving rise to the field of conflict of laws. The States enjoy wide latitude in fashioning choice- of-law rules.")

## CONCLUSION

The decision below should be affirmed with respect to Question 1. *Amici* collectively take no position with respect to Question 2.

Respectfully submitted.

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# APPENDIX

# APPENDIX: AMICI STATEMENTS OF INTEREST

Mae Kuykendall, Professor of Law, Michigan State University, has published extensively on both the licensing and recognition issues.[28] She suggested in the 1990s that imposing a restricted meaning on the word by inserting a legislative "defined term" in state codes was artificial. The turn to a definitional method constituted a concession that marriage has taken on a more inclusive meaning than its traditional binary understanding. She has nonetheless argued that a more dynamic federalism could benefit the institution of marriage by encouraging states to provide more convenient marriage access for all couples and, potentially, substantive variations that adjust to couple needs and public values. She suggests that marriage authorization as an initial matter need not be grounded in the coincidence of geography with jurisdictional lines. That is, states may authorize marriage for persons who do not reside in their jurisdiction and do not travel to it.

At the same time, as states accommodate distant couples, each jurisdiction would retain lawmaking authority over the normative shape of marriage law pursuant to the values and ideas of the jurisdiction. Kuykendall has thus concluded that marriage law would benefit if it were modernized better to address the needs of a mobile society. Each state could pro-

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[28] See, e.g., Mae Kuykendall, Equality Federalism: A Solution to the Marriage Wars, 15 U. Penn. J. Const. L. 377; Adam Candeub and Mae Kuykendall, Modernizing Marriage, 44 U. Mich. J. Law Reform 735 (2010).

vide more or less flexible means of solemnizing marriages for couples not resident in the state. Under the position stated in the brief, states would retain the primary control over the value statements that their marriage licensing law is felt to contribute to marriage law. The Court's expertise as a referee of federalism is a good match for the nature of the marriage question.

Kuykendall has proposed that the right of states to fashion their own marriage law, and to integrate a shared norm of fairness into the law, be joined to an obligation to recognize legal marriages of couples of the same sex. Kuykendall has argued that states will be able to fashion, through the common law work of judges, state law respectful of equality, and considerate of the legal status, rights, and interests of couples whose relationship is enfolded into the obligations and dignity of the marital association. Unlike some on the left side of the political spectrum, and even some on the right, who argue for the withdrawal of the state from sponsoring marriage, Kuykendall regards marriage as a critical institution of society that state involvement supports. She regards the retention by individual states of the primary control over building the legal framework and social role of marriage as the most prudent path to strengthening marriage on a basis of equal rights and respect for all couples.

David R. Upham, Ph.D., J.D. is Associate Professor of Politics at the University of Dallas, where he teaches graduate and undergraduate courses in constitutional law and American political thought. He has researched and published extensively in the history of the Fourteenth Amendment. His published

work includes a recent study on interracial marriage and the original understanding of that Amendment.[29]

Michael Worley is an attorney. His work on this Court's religious freedom and family policy cases has appeared in the Oxford Journal of Law and Religion as well as more general publications. He opposes same-sex marriage for a host of utilitarian and sociological reasons. In his view, many of the arguments in favor of laws defining marriage as between one man and one woman have been unfairly pigeonholed as irrelevant or irrational. This is largely because the institutional aspects of marriage are easily ignored or mischaracterized in the public square. Worley regards marriage as a critical institution of society that state involvement supports. While the environment in some states has changed the institutional significance of marriage, other states have been successful in creating an environment supportive of marriage between a man and a woman. Worley joins this brief to help explain the institutional aspects of marriage and the consequences of applying the Fourteenth Amendment to state marriage law in environments that support marriage between a man and a woman. He is grateful for the fact that those who disagree even on difficult issues such as this can still find common ground, as the signers of this brief have done.

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[29] David R. Upham, *Interracial Marriage and the Original Understanding of the Fourteenth Amendment*, 42 Hastings Const. L. Q. 213 (2015).